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Communis Error Facit Jus

Frederick G. McKean Jr.

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Communis Error Facit Jus

As a general rule, a maxim resembles a small-scale map in that important details are necessarily omitted by reason of its narrow compass. The ifs, whenevers, wherever, but, provided that, and other modifiers are crowded out for the practical reasons that no memory would charge itself with such labyrinthine details, and no human foresight could anticipate the requirements of such an attempted formula on account of the never ceasing changes in the factual requirements of human affairs. Even the six honest servingmen of Kipling's verse would find such an undertaking to be beyond their powers. In view of the almost harsh provisions of our law on the subject of mistake of law, it sounds somewhat inconsistent to say that common error makes law; and if the maxim were applied literally to the familiar *ignorantia legis neminem excusat*, it would establish the proposition that ignorance of the existence of a common error as to the law excuses no one. Unfortunately for lovers of paradoxes, both maxims have their recognized exceptions; and fortunately for the development of our legal system the word "sometimes" is implied in the translation of the title of this paper. The principle is one that should be used with caution. In many cases the context of the opinions shows that it is employed as a make-weight—a convenient excuse for the avoidance of a revision of legal theory which might lead to disastrous results such as unsettling property or contract rights. Occasionally the aphorism is lightly used as a rhetorical embellishment as in a case wherein it was mistakenly applied to a mutual error of parties litigant.

It is submitted that in its inception common error is "law taken for granted," to borrow the phrase of Lord Denham. In the case of *O'Connell v. The Queen*,¹ the distinguished judge, in refusing to follow an opinion of the

¹11 Cl. & F. 155, 372-373 (1844).

legal profession based on a *dictum* of Lord Mansfield, observed:

I am tempted to take this opportunity of observing that a large portion of that legal opinion which has passed current for law, falls within the description of "law taken for granted". If a statistical table of legal propositions should be drawn out, and the first column headed "Law by Statute," and the second, "Law by Decision," a third column, under the heading of "Law taken for granted," would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine,—the mere repetition of the *catilena* of lawyers cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle.

The dissenting opinion of Lord Brougham² presents another angle of the problem and expresses a view which is frequently followed. He asks,

. . . How much of the known and admitted law of this country in which the books abound and by which the Courts are guided, would be struck out and cease to rule us, were all struck out on which no decision has ever been formally pronounced? A doctrine may be without any decision to support it expressly, because it never has been denied; it may rest on no cases but on the common understanding of the Profession, precisely because it never has been brought into doubt.

In a measure, application of the principle of common error amounts to an adoption of custom, although not to so great an extent as in Scotland and in the old Spanish law. In the former country, custom opposed to the enforcement of a statute is said to have carried so much weight, (at least in former times), as to cause written law

²Ib. p. 355.

to become inoperative through desuetude; while in the latter system it was the law that custom may repeal or alter anterior law.³ So firmly rooted was this practice in Spanish law that some jurisdictions have felt it necessary to repeal it by direct enactment, as in Argentine where it is provided that "Laws cannot be repealed, either in whole or in part, except by other laws. Usage, custom or practice cannot create rights, unless the laws make reference thereto."⁴

Returning to Anglo-American law—it is fairly well established at the present time, that in order for custom to become law, it must first receive the sanction of judicial decision;⁵ and this is especially true where it is sought to be established that law has been made by common error.⁶ Lord Denham's position that custom or usage does not become recognized as law prior to its formulation by judicial authority, is probably accepted in all common law jurisdictions. It is to be noted that the distinguished jurist does *not* assert that all doctrines should be "struck out on which no decision has ever been formally pronounced," nor does he deny that a doctrine which has no decision to support it may subsequently be adjudged law without judicial precedent, as was the case in *Birkley v. Presgrave*,⁷ where a tacit acquiescence by a community as to the existence of a right was deemed a decisive factor in determining litigation for which there was no judicial precedent. Mr. Justice Storey took a similar position in the case of *Manchester v. Hough*,⁸ where he held that universal usage affecting titles to land constituted "a case in which the doctrine might be fairly applied, that *communis error facit jus*."⁹ To a certain extent this rule overlaps the principle of Anglo-American

³Adams v. Norris, 23 How. 353, 364 (U. S. 1859).

⁴Argentine Civil Code, art. 17, Jannin's (1917) translation.

⁵19 Harv. L. Rev. 309 (1906).

⁶O'Donnell v. Glenn, 9 Mont. 452, 23 Pac. 1018, 8 L. R. A. 629 (1890).

⁷1 East, 220 (Eng. 1801).

⁸Fed. Cas. 9,005 (U. S. C. C. D. R. I. 1828).

⁹Bell v. Gough, 3 Zab. 624, 662, 663, 666 (N. J. 1852); Davey v. Turner, 1 Dall. 11 (Pa. 1764); Lloyd v. Taylor, 1 Dall. 17 (Pa. 1768); Eppes v. Randolph, 2 Call. 125, 152 (Va. 1799) accord.

law that accepted usages and practices arising within the jurisdiction are recognized as common law.¹⁰ In such a class of cases there is added "to the sanction of general recognition the express formulation of judicial and expert authority" to borrow Sir Paul Vinogradoff's illuminating phrase. The practice of conveyancers has often been looked upon as expert authority on questions of the law of real property, persuasive although not binding; and the maxim *communis error* has been deemed peculiarly applicable to such problems.¹¹ Indeed the maxim seems almost as binding in the law of property as the principle *stare decisis*, at least so far as the protection of rights is concerned. That even common understanding and the practice of conveyancers is not binding on a court was decided in the case of *Ocean Beach Association v. Brinly*,¹² where it was urged that the maxim *communis error facit jus* sanctioned a common assumption that the signature of the wife of one of the proprietors of the eastern district of New Jersey (formerly the Province of East Jersey), was not necessary to pass lands held by such proprietor free of dower. The court refused to apply the maxim apparently on the well-grounded principle seldom mentioned but often implicitly followed, that while common usage may be allowed to sustain titles it will not be permitted to destroy titles, such as dower rights. In other words, wherever a fair and reasonable rule of property has been so well established and widely recognized that many titles depend upon it, it will not be disturbed by courts except for very cogent reasons.¹³

¹⁰Addison v. Otway, 2 Mod. 233 (Eng. 1677); Com. v. Knowlton, 2 Mass. 530 (1807); Com. v. Chapman, 54 Mass. 68 (1848); Baker v. Jordan, 3 Ohio St. 438, 442 (1854); Guardians of the Poor v. Greene, 5 Binn. 554, 558, 560 (Pa. 1813), accord.—An interesting parallelism is afforded in the civil law jurisdiction of Louisiana where the English rules of evidence in civil cases, and the law merchant of American common law States were introduced by usage.—La Dranguet v. Prudhomme, 3 La. O. S. 83, 86 (c. 1831); McDonald v. Millaudon, 5 La. O. S. 403, 408-9 (1833).

¹¹9 App. Cas. 392, 409 (Eng. 1884).

¹²34 N. J. Eq. 438, 448 (1881).

¹³Hallet v. Forest, 8 Ala. 264, 267 (1845); Pond v. Irwin, 113 Ind. 243, 247 (1887); Croan v. Phelps, 14 Ky. 915 (1893) *semble*;

Where the matter is covered by an old statute, the common error may modify the law in part or complete it; but not abrogate it.¹⁴

It is elementary that courts have no power to supply omissions in legislation;¹⁵ but inasmuch as a glance at many of the cases cited in these notes will satisfy an observer that numerous instances of common error consist in the extension of statutory enactments to analogous situations not covered thereby, it is clear that usage partakes somewhat of a legislative character from the standpoint of the common law. In civil law jurisdictions, on the other hand, the approved methods of statutory interpretation permit courts of law to place an extensive construction upon legislation in order to supply a *casus omissus* within the spirit of an enactment, and thus reach a result similar to that sometimes attained in common law jurisdictions by means of a common error.¹⁶ Occasionally a question of common error may be submerged by a determination that a statute whose letter is seemingly violated thereby is merely directory and not mandatory.

In general, it may be observed that even where a prevalent doctrine is not well founded in legal reason or technology, if a change of decision would unavoidably unsettle the

Malonny v. Mahar, 1 Mich. 26 (1847); Burge v. Smith, 27 N. H. 332, 336, 338 (1853); Gleason v. Emerson, 51 N. H. 405 (1871); Kostenbader v. Spotts, 80 Pa. 430, 437 (1876); Reed v. Geddes, 287 Pa. 274 (1926).

¹⁴United States v. Dickson, 15 Pet. 144, 161 (U. S. 1841) *semble*; Railway Co. v. Phelps, 137 U. S. 528, 536 (1890) *semble*; United States v. Mo. Pac. R. Co., 278 U. S. 269, 277, 280 (1929); Hallet v. Forest, note (13) *supra*; Ezekiel v. Dixon, 3 Ga. 146, 153 (1847); Van Loon v. Lyons, 61 N. Y. 22, 25 (1874); Chestnut v. Shane's Lessee, 16 Ohio (1847); Dutoit v. Doyle, 16 Ohio St. 400, 407 (1865); Kostenbader v. Spotts, 80 Pa. 430, 437, (1876); New River Co. v. Hereford Commissioners, 2 H. & N. 129, 139 (Eng. 1857); Ralston v. Hamilton, 4 Macq. 397, 405 (Eng. 1862) *semble*; Calwell v. McLaren, 9 App. Cas. 392, 409 (Eng. 1884) *accord*.

¹⁵United States v. Union Pac. R. Co., 91 U. S. 72, 85, 86 (1875).

¹⁶This obsolete principle used to obtain in common law jurisdictions under the designation "equitable construction", or under the guise of applying "the equity of the statute".

titles of great numbers of persons or create a wide-spread disturbance of business, such consideration would present a strong case for the application of the maxim *communis error* or the principle *stare decisis*. Some courts have gone so far as to hold that they have no power to make a change of decision which might affect existing contracts.¹⁷ Where such is the case, a common error which has received the guinea stamp of judicial adoption could only be eradicated by prospective legislation. As a rule public policy would require that courts should hesitate to overrule precedents where contracts have been made in reliance upon a decision, even where based upon a common error;¹⁸ but it is believed that such considerations do not apply to usages opposed to the law merchant.¹⁹

As Dr. Lieber has observed in his somewhat neglected work on Hermeneutics, the certainty of law is next in importance to its justice. Sometimes rhetorical language is found in opinions to the effect that certainty in the law is of more importance than justice; but it will generally appear from the context that where such a statement appears, it has been found expedient to adhere to a rule which works substantial justice in a majority of cases although found to work hardship in an exceptional case. At the same time it must be admitted that widely prevalent rules are to be found embedded in Anglo-American law which are exceedingly unsatisfactory; such as that of *Dumpor's Case*²⁰ "at which the profession have wondered," and Coke's invention, *actio personalis cum persona moritur*, which, in spite of many engrafted exceptions, still works mischief in the teeth of legislation aimed at the eradication of its doctrine. Sometimes a troublesome rule is gradually and by almost imperceptible degrees altered by distinguishing a leading case in which it has been formulated until

¹⁷*Harmon v. Auditor*, 123 Ill. 133 (1887); *Haskett v. Maxey*, 134 Ind. 182; *Thomas v. State*, 76 Ohio St. 341, 361 (1907).

¹⁸In *re Wallis*, 25 Q. B. D. 176, 180 (1890); *Salmond, Jurisprudence* (1916 ed.) 166.

¹⁹*Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74 (1883) *semble*.

²⁰4 Co. 119b (1613).

transmuted into a form found to be more just and satisfactory.²¹ There are two extreme schools of thought on this subject. One which contends that a blunder consecrated by time must be amended by the legislature, and the other that courts should be prompt to admit and correct judicial error. A few States require their highest court to report to the legislature such changes in the law as are found to be desirable. All jurisdictions require courts of the first instance and intermediate courts to follow the last applicable decision of their appellate superiors regardless of personal opinion as to its soundness.²² Some principles are so deeply established that courts have no power to abolish them;²³ and it needs no citation of authorities to show that where the balance of social or public convenience, to say nothing of the requirements of sound judicial policy, demand retention of a rule, such considerations will be deemed conclusive; and alteration or amendment left to the discretion of the legislature whose action being prospective would not have harmful results.

The doctrine of common error does not apply to anti-social notions regarding the law. Hence it is almost a universal rule that ignorance of the law is no excuse for crime.²⁴ Accordingly it was decided in the case of *Wallis v. Mease*,²⁵ that common opinion to the effect that a certain class of felony was merely a civil trespass, is no ground for application of the maxim, *communis error facit jus*. As a general proposition it may be postulated that the doctrine of common or universal error does not apply to criminal law or procedure even where such error has been prevalent among judges as well as the legal profession. Thus, the widely prevalent English rule that an acquittal after trial on an

²¹*Wills v. Manufacturers N. Gas Co.*, 130 Pa. 222, 232, 234 (1889).

²²*McKean*, *The Rule of Precedents*, 76 U. of Pa. L. Rev. 481, 486 (1928).

²³*Aud v. Magruder*, 10 Cal. 282 (1858); *Paul v. Davis*, 100 Ind. 422 (1884); *Francis v. Telegraph Co.*, 58 Minn. 252, 59 N. W. 1078 (1894); *Dacey*, *Law and Opinion in England* (1914) 488.

²⁴*McKean*, *Presumption of Legal Knowledge*, 12 St. Louis L. Rev. 96, 97 (1927).

²⁵3 Binn. 546, 550 (Pa. 1811).

insufficient indictment may be followed by an indictment for the same offense, was rejected in the case of *United States v. Ball*,²⁶ although widely accepted in American jurisdictions. There is no vested right in erroneous precedents in criminal law;²⁷ and courts will not hesitate to discard a practice, usage or belief, in criminal procedure, which is demonstrated to be unfair, unworkable or otherwise unsatisfactory.²⁸

The underlying policy is different in civil practice from that of the criminal law, for common error, opinion or usage will sanction methods of civil procedure, especially where hallowed by lapse of time and general acquiescence, and particularly where experience has shown that there has been no inconvenience occasioned thereby.²⁹ If, however, a case should arise wherein strict adherence to a rule of procedure would work injustice, courts have the power to relax or modify such rule regardless of its antiquity;³⁰ but wherever a practice ensures reasonable order, certainty and celerity in the conduct of legal business, and is fair and just in its purpose and results, questions as to its theoretical correctness would carry no weight with a modern court of law. Much fallacy lurks in the literal application of many a Latin maxim, including the subject of these notes, which is supposed to be an invention of Sir Edward Coke. As an instance, the scantily reported case of *East India Co. v. Skinner*,³¹ sanctioned the issue and enforcement of a warrant to break down doors in case of opposition, in order to distrain for taxes not yet due, ad-

²⁶163 U. S. 662 (1895).

²⁷*State v. Mathews*, 143 Tenn. 463, 226 S. W. 203 (1920).

²⁸*United States v. Ball*, *supra*, note 26; *O'Connell v. The Queen*, 11 Cl. & F. 155 (1844).

²⁹*Hallet v. Forest*, 8 Ala. 264, 267 (1845); *M'Ginnis v. Lillard's Exr.* 4 Bibb. 490 (Ky. 1817); *Lewis v. Jones*, 1 Ashm. 53 (Pa. 1823); *Dougherty's Estate*, 9 W. & S. 189, 196 (Pa. 1844); *Watson v. Willard*, 9 Pa. 89, 93 (1848); *Eshelman v. Shuman's Admr.*, 1 Har. 560 (Pa. 1850); *Hazard v. Martin*, 2 Vt. 77, 84 (1829); *Jones v. Hobson*, 2 Rand. 483, 501, 502 (Va. 1824); 4th Inst. 240.

³⁰*McKean*, *The Rule of Precedents*, 76 U. of Pa. L. Rev. 481, 496 (1928).

³¹*Comberbach* 342 (7 Wm. III).

mittedly in violation of strict law, but upheld on the ground that "the Practice having been in this Case of Taxes to grant such a conditional Warrant to distrain; *Communis Error facit jus.*" Such a decision acquiesces in a breach of the old English common law principle that the law is above the Government, sanctions a violation of the venerable principle of due process of law, and approves of tyrannical injustice. Surely this is a fitting instance "where an old case is contrary to the principles of the general law" and "the Court of Appeal ought not to shrink from overruling it even after a considerable lapse of time". In American law the question goes deeper than the letter of the Constitution for "the fourteenth amendment prohibits a State from depriving any person of life, liberty or property without due process of law, but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson . . . it secures 'the individual from the exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' . . ."³² In deciding political questions emphasis is placed on contemporaneous and practical construction.³⁴ Our historic fiction under which Presidential Electors are bound by convention to cast pre-instructed votes, and many other political usages contrary to the express language of the Constitution, may be supported as Constitutional usages—unwritten Constitutional usages—defendable upon the ground of necessity, convenience, utility, fairness and overwhelming popular sanction and acquiescence,—“shaped by the cooperative action of the whole community”—which it is beyond the power of courts to disturb. It may not be

³²Smith v. Keal, 9 Q. B. D. 340, 450 (1882), Jessel, M. R.

³³United States v. Cruikshank, 92 U. S. 542, 554 (1875) Waite, C. J.

³⁴Tyler v. Flanders, 58 N. H. 371 (1878) Doe, C. J.; Cronise v. Cronise, 54 Pa. 255, 261 (1867) Agnew, J.; Bethlehem v. Allentown, 275 Pa. 110, 115 (1922), Moschzisker, C. J.

considered extravagant to suggest that such usages are law by unanimous consent.

That custom is the best expounder of the law may be traced back to the time of Tribonian.³⁵ The principle has been expressed in many forms, and is at the base of the rules regarding administrative construction in the interpretation of statutes. . . . "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect is entitled to very great weight, . . ." ³⁶ and "in a case of doubt ought to turn the scale."³⁷ If an act is obscure in its terms "communis error facit jus;"³⁸ but "where a statute . . . is clear and free from all ambiguity . . . the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the government, even though it may be the settled practice of "an executive department."³⁹ And where an administrative construction is not in conformity to the true intentment and provision of a statute it will not be permitted to conclude the judgment of a court of justice.⁴⁰ It being elementary that where no ambiguity exists there is no room for construction, (and necessarily no place for application of the maxim *communis error*,) it has been decided in *United States v. Missouri Pacific Railway Co.*,⁴¹ that courts are not bound by a definitely settled administrative construction of a statute.

Cautiously worded statements in many modern treatises on Constitutional Law indicate that there are cases in which common error will determine questions of the constitutionality of statutes; but it is believed that such views are archaic. As Mr. Justice Simpson has pointed out in the

³⁵D. I. 3, 37.

³⁶*Edwards' Lessee v. Darby*, 12 Wheat. 206, 210 (U. S. 1827) Trimble, J.

³⁷*Brown v. United States*, 113 U. S. 568, 570 (1884) Woods, J.

³⁸*Turk v. McCoy*, 14 Serg. & R. 349, 352 (1826) Rogers, J.

³⁹*St. Paul etc. Ry. Co.*, 137 U. S. 528, 536 (1890).

⁴⁰*United States v. Dickson*, 15 Pet. 141, 161 (U. S. 1841).

⁴¹278 U. S. 269, 277, 280 (1929).

case of *Heisler v. Thomas Co.*,⁴² for a court to decide a question of constitutionality otherwise than in accordance with its mature judgment is to violate its "duty to support the Constitution as the supreme law." The modern view has been clearly set forth in *Kucker v. Sunlight Oil & Gasoline Co.*,⁴³ as follows:

While a court should hesitate to declare a statute unconstitutional until clearly satisfied of its invalidity and where it has been on the statute books for many years the hesitation should be all the greater, yet, if such an act is plainly in conflict with the organic law of the state, old age cannot give it life, and when the issue of its constitutionality is properly raised, it must be declared void.⁴⁴

This position is strongly supported by the action of the Supreme Court of the United States in the celebrated case of *Pollock v. Farmers' Loan & Trust Company*,⁴⁵ in which a long line of cases dating back to the early days of the Republic, supported by the consensus of opinion of text-books on Constitutional Law, was unequivocally overruled; thereby establishing the principle that neither *stare decisis* nor common error will sustain a view of Constitutional Law found to be incorrect.

It has been observed that "the expression of legal rules in customs and judicial determinations has always a casuistical and indefinite character;" that "legal customs as well as judicial precedents are gradually formed to the extent

⁴²274 Pa. 448, 453, 118 Atl. 394, 24 A. L. R. 1215 (1922); affirmed 260 U. S. 245 (1922).

⁴³230 Pa. 528, 79 Atl. 747, Ann. Cas. 1912A (1911)—Moschzisker, J.

⁴⁴*Sadby v. Langham*, 34 Ala. 311, 334 (1859); *San Francisco v. Spring Valley Water Works*, 48 Cal. 493 (1874); *Anderson v. State*, 42 Ga. 9, 32, 34 (1871); *Fergus v. Brady*, 277 Ill. 272, 115 N. E. 393, Ann. Cas. 1918B (1917); *Commissioners v. Bridge Co.*, 109 Md. 1 (1908); *Stumpf v. Storz*, 156 Mich. 228 (1909); *People v. Allen*, 42 N. Y. 378, 384 (1870); *State v. Beacom*, 66 Ohio St. 491, 507, 508 (1902); *Hamann v. Heekin*, 88 Ohio St. 207, 102 N. E. 730, Ann. Cas. 1915A 1058 (1913); accord.

⁴⁵158 U. S. 601 (1895).

that there is call for the application of legal rules to special and definite cases;" and that "legal rules cannot therefore find in these forms and expressions that which is at the same time precise and general."⁴⁶ It has also been noticed that courts endeavor "to hold a just middle way between excess of valour and excess of caution" in the solution of legal problems, for "a too daring expounder is in danger of laying down sweeping rules without attending to the probable variations in the circumstances to which they will be applied; and then the application of this rule may have to be confined within tolerable bounds by a series of qualifications which leave it, to use a classical description, well nigh eaten up by exceptions."⁴⁷ On the other hand, the pedestrian timidity that shrinks from hazarding any general conclusion will only leave us in a still less desirable state, that of having no principle at all, but a heap of unrelated instances which those who come after may or may not find to be consistent with one another."⁴⁸ In view of these considerations it is gratifying to find that in the course of deciding the hard-fought case of *O'Donnell v. Glenn*,⁴⁹ one of the contestants endeavored to sustain a view on the ground of common error, Mr. Justice De Witt, of the Supreme Court of Montana, found it necessary to lay down a few rules which clear considerable ground. These rules, eight in number, are as follows:

1. The common error must be one having some judicial or professional recognition, proved or tolerated by decisions of judges, or to put the rule less positively, such judicial or professional recognition

⁴⁶Korkunov, *General Theory of Law*, (Hastings' translation) 425 (1909).

⁴⁷Compare article 5 of the Code Napoleon, "The judges are forbidden to pronounce, by way of general and legislative determination, on the cases submitted to them."

⁴⁸Pollock, *Judicial Caution and Valour*, 45 *Law Quarterly Review*, 293, 296 (1929).

⁴⁹Mont. 452, 461 (1890).—The annotations are those of the present writer.

adds to the law-making force of the common error.⁵⁰

We further qualify the rule, in this, that common error may possibly have the law-making power, when supported by lay opinion only, provided that other rules may be forcibly applied.⁵¹

2. Courts will not lightly or inconsiderately allow a common error to subvert a rule of law or abrogate a positive statute.⁵²

3. The error must be a universal or a very general one. The nearer universal, the more forcibly will it address itself as a lawmaker to the approval of the courts.⁵³

4. The acquiescence in the common error has involved, or there depends upon it large property interests.⁵⁴

5. The error must be one that people have relied

⁵⁰McKeen v. Delancy's Lessee, 5 Cr. 22 (U. S. 1809); Hallet v. Forest, 8 Ala. 264, 267 (1845); Davey v. Turner, 1 Dall. 14 (Pa. 1764); Lewis v. Jones, 1 Ashm. 53 (Pa. 1823); York's Appeal, 110 Pa. 69, 78 (1885) *semble*; King v. Inhabitants of Eriswell, 3 Term Rep. 707, 725 (Eng. 1790); Reg. v. Justices of Sussex, 2 B. & S. 664, 680 (Eng. 1862); Foakes v. Beer, 9 App. Cas. 605, 629, 630 (Eng. 1884); Salmond, Jurisprudence, (1916 ed.) 166; accord.

⁵¹Tyler v. Flanders, 58 N. H. 371, 373 (1878), Doe, C. J.; Baker v. Jordan, 3 Ohio St. 438, 441, 442 (1854); accord. Ocean Beach Assn. v. Brinly, 34 N. J. Eq. 438, 448 (1881) *contra*.

⁵²United States v. Mo. Pac. R. Co., 278 U. S. 269, 277, 280 (1929); Van Loon v. Lyons, 61 N. Y. 22, 25 (1874); Caldwell v. McLaren, 9 App. Cas. 392, 409 (Eng. 1884); accord.

⁵³Malonny v. Mahar, 1 Mich. 26 (1847); Dutoit v. Doyle, 16 Ohio St. 400, 407 (1865); Turk v. McCoy, 14 Serg. & R. 349, 352 (Pa. 1826); accord.

⁵⁴Manchester v. Hough, 5 Mason 67, Fed. Cas. 9,005 (1828), Story, J.; In Matter of Will of Warfield, 22 Cal. 51, 71 (1863) *semble*; Croan v. Phelps, 14 Ky. 915 (1893); Burge v. Smith, 27 N. H. 332, 336, 338 (1853); Kirk v. Dean, 2 Binn. 341, 345 (Pa. 1810); Davey v. Turner, 1 Dall. 11 (Pa. 1764); Lloyd v. Taylor, 1 Dall. 17 (Pa. 1768); Eppes v. Randolph, 2 Call. 125, 152 (Va. 1799); Tamblin v. Crowley, 99 Wash. 133, 138 (1917); Pugh v. Golden Valley Ry. Co. 15 Ch. D., 330, 334, 335 (Eng. 1880); accord.

and acted upon and have fixed their rights and positions.⁵⁵

6. The longer the error has existed the greater force it has.⁵⁶

7. The error must be clearly proved.⁵⁷

8. The error must be in the observing, construing or interpreting of law⁵⁸ and not an error in directly disobeying and abrogating that which is law.⁵⁹

Many judges have taken care to remind us that legal certainty is of more importance than theoretical correctness; but, as in general, courts will not hesitate to overrule cases which are not only erroneous but tend to work in-

⁵⁵*Manchester v. Hough*, supra note 54; *M'Ginnis v. Lillard's Exr.* 4 Bibb. 490 (Ky. 1817); *Malonny v. Mahar*, supra note 53; *Gleason v. Emerson*, 51 N. H. 405 (1871); *Chesbut v. Shane's Lessee*, 16 Ohio 599 (1847); *Kirk v. Dean*, 2 Binn 341, 345 (Pa. 1810); *Kostenbader v. Spotts*, 80 Pa. 430, 437 (1876); *Pugh v. Golden Valley Ry. Co.*, supra note 54; *Smith v. Keal*, 9 Q. B. D. 340, 350 (Eng. 1882), *Jessel, M. R.*; accord.

⁵⁶*McKeen v. Delancy's Lessee*, 5 Cr. 22 (U. S. 1809); *Gleason v. Emerson*, 51 N. H. 405 (1871); *Chesnut v. Shane's Lessee*, 16 Ohio, 599 (1847); *State v. Frear*, 138 Wis. 536 (1909); *Exparte Willey*, 23 Ch. D. 118, 127 (1883); accord.

⁵⁷*Lewis v. Jones*, 1 Ashm. 53 (Pa. 1823); *Janovrin v. De La Mare*, 14 Moo. P. C. 334, 348 (1861); *Queen v. Justices of Sussex*, 2 B. & S. 664, 680 (1862); accord.

⁵⁸*Hallet v. Forest*, 8 Ala. 264, 267 (1845); *Jack v. Shoemaker*, 3 Binn. 280 (Pa. 1810); *Turk v. McCoy*, 14 Serg. & R. 349, 352 (Pa. 1826); *Dougherty's Estate*, 9 W. & S. 189, 196 (Pa. 1844) *Gibson, C. J.*; *Kostenbader v. Spotts*, 80 Pa. 430, 437 (1876); *Hazard v. Martin*, 2 Vt. 77, 84 (1829); *State v. McKinney*, 28 Va. 42, 60 (1829); accord.

⁵⁹*St. Paul etc. Ry. Co., v. Phelps*, 137 U. S. 528, 536 (1890); *San Francisco v. Spring Valley Water Works*, 48 Cal. 493 (1874); *Ezekiel v. Dixon*, 3 Ga. 146, 153 (1847); *Anderson v. State*, 42 Ga. 9, 32, 34 (1871); *County Commissioners v. Pocomoke Bridge Co.*, 109 Md. 1 (1908); *Ham v. Sawyer*, 83 Me. 37 (1854); *State v. Wrightson*, 56 N. J. L. 126, 206 (1893) *semble*; *Van Loon v. Lyons*, 61 N. Y. 22, 25 (1874); *Jones v. Hobson*, 2 Rand, 483, 501, 502 (Va. 1824); *Lawrence University v. Outgamie Co.*, 150 Wis. 244, 136 N. W. 619 (1912); *O'Connell v. The Queen*, 11 Cl. & F. 155, 373 (Eng. 1844); *New River Co. v. Hereford Commissioners*, 2 H. & N. 129, 139 (1857) *Pollock, C. B.*; *Jones v. Tapling*, 12 C. B. N. S. 826, 847 (Eng. 1862); accord. *State v. Tawney*, 83 Kan. 597, 602, 603 (1910)—*Contra*.

justice,⁶⁰ the maxim *Communis error facit jus* . . . will not sustain "a rule which in its tendency is calculated to foster bad faith and defeat the purpose of justice," even though followed by many reported cases, elementary books and abridgments.⁶¹

⁶⁰Hauser v. York Water Co., 278 Pa. 387 (1924), Simpson, J.

⁶¹Leavitt v. Morrow, 6 Ohio St. 71, 67 Am. Dec. 334, 336, 338 (1856).—Harvey v. Tama County, 53 Iowa 228, 233 (1880), accord.

FREDERICK G. McKEAN, Jr.